Malaysia Building Society Bhd v Modern Crest Sdn Bhd & Ors

HIGH COURT (MELAKA) — SUIT NO 22–99 OF 1999
LOW HOP BING J
28 NOVEMBER 2006

Civil Procedure — Pleadings — Findings on matters not pleaded — Whether court had a duty to hear and determine unpleaded issues

This was the plaintiff's claim against all the three defendants for the sum of RM52,905,900.58 for a number of facilities granted to them. As the second and third defendants had failed to enter appearance, judgment in default had been entered against them. The first defendant filed its defence on 4 October 2000. The first defendant's learned counsel submitted that the plaintiff was not entitled to the sum claimed as the plaintiff had after obtaining an order for sale foreclosed certain portion of the land and had also received compensation for certain portion of the land acquired by the Melaka State Authority. Learned counsel for the plaintiff contended that the first defendant was not entitled to raise unpleaded issues.

Held:

It is to be noted that the issues raised for the first defendant are truly unpleaded. On the other hand, none of the issues pleaded in the first defendant's amended defence was the subject matter of the first defendant's submission. Harking back to first principles in civil procedure, it is trite law that parties are bound by their pleadings. An offshoot of this principle is that parties must adduce evidence and advance their submissions on the basis of their pleaded issues. There is no duty on the court to hear and determine unpleaded issues (see paras 20–22).

[Bahasa Malaysia summary

Ini ialah tuntutan plaintif-plaintif terhadap ketiga-tiga defendan untuk jumlah sebanyak RM52,905,900.58 untuk beberapa kemudahan-kemudahan yang diberikan kepada mereka. oleh kerana defendan kedua dan ketiga gagal memasukkan kehadiran, penghakiman ingkar dimasukkan terhadap mereka. Defendan pertama memfailkan pembelaannya pada 4 Oktober 2000. Peguamcara bijaksana defendan pertama menghujahkan bahawa plaintif tidak berhak kepada jumlah yang dituntut oleh kerana plaintif telah memperolehi satu perintah jualan terhadap sebahagian daripada hartanah yang dicagarkan dan juga telah menerima pampasan atas sebahagian daripada hartanah yang diperoleh oleh Pihak Berkuasa Negeri Melaka. Peguamcara bijaksana plaintif menyatakan bahawa defendan pertama tidak harus membangkitkan isu-isu yang tidak diplidkannya.

Diputuskan:

Ia harus diambil perhatian bahawa isu-isu yang dibangkitkan oleh defendan pertama tidak langsung diplidkan. Sebaliknya, tiada isu-isu yang diplidkan di dalam pembelaan defendan yang dipinda merupakan perkara pokok hujahan defendan pertama. Mengikut prinsip pertama acara sivil, adalah undang-undang mantap bahawa pihak-pihak diikat dengan pliding mereka. Di samping prinsip ini, pihak-pihak harus mengemukakan bukti dan hujahan-hujahan mereka atas isu-isu yang diplidkan. Tiada kewajipan atas mahkamah untuk mendengar dan menentukan isu-isu yang tidak diplidkan (lihat perenggan 20–22).]

Notes

For cases on findings of matters not pleaded, see 2 *Mallal's Digest* Consolidated Subject Index paras 4819–4822.

Cases referred to

Kamarudin bin Mamat v Ketua Polis Negara & Kerajaan Malaysia [2004] 4 MLJ 201 (refd)

Abu Bakar Jais (Helmi Hamzah with him) (Hisham Sobri & Kadir) for the plaintiff. TY Teh (TY Teh & Partners) for the first defendant.

Low Hop Bing J:

PLAINTIFF'S CLAIM

[1] This is the plaintiff's claim against all the three defendants for the sum of RM52,905,900.58 as at 27 November 1998, with interest thereafter at 12% p.a. until the date of realisation, and costs.

[2] The writ has been served on the second and third defendants on the same date, ie 18 October 1999. As these two defendants had failed to enter appearance, judgment in default thereof in the above terms had been entered against them on 8 December 2000.

[3] The first defendant filed its defence on 4 October 2000. I am therefore concerned only with the hearing and determination of the plaintiffs claim against the first defendant.

FACTS OF THE CASE

[4] Parties herein have agreed not to call any witness, but to rely on the bundle of documents and witness' statements from which the relevant facts may be set out as follows.

[5] The first defendant has vide a proposal paper and letter of application dated 2 April 1996 applied to the plaintiff for a term loan of RM55m and a bridging loan of RM18m to partly finance the development of Kota Melaka 2 and Melaka Inland

Port (collectively, 'the project') on an approximately 646.7 acres of land situated in Simpang Empat Melaka ('the project land').

[6] Pursuant to the plaintiffs letter of offer dated 24 July 1996, the plaintiff agreed to grant loan facilities to the defendant for a total sum of RM77m, of which RM42m was by way of term loan and RM35m as bridging loan, both with interest at 11% p.a. on monthly rests, subject to the plaintiffs right to vary it by way of written notice to the first defendant, and, for late payment, an additional interest of 1% p.a. above the prescribed rate.

[7] The first defendant vide letter dated 26 July 1996 accepted all these terms which were further confirmed by the first defendant vide letter dated 29 July 1996.

[8] On 14 August 1996, the plaintiff and first defendant entered into a loan agreement, wherein para 4(a) provides for the term loan to be divided into two parts viz RM30m to redeem the project land and RM12m to partly finance the development deposit for the project.

[9] A reference hereinafter to a paragraph is a reference to that paragraph in the loan agreement, unless the context otherwise requires.

[10] Pargraph 4(b) divides the bridging loan into three parts viz RM5m to finance the pre-development of the project, RM18m to finance part of the costs in the development of industrial park and RM12m to finance part of the costs in the development of inland port.

[11] For the above facilities, the first defendant provided the following securities:

(i) a third party legal charge dated 14 August 1996 executed by Medan Kartika Sdn Bhd;

(ii) a debenture dated 10 October 1996 executed by the plaintiff; and

(iii) a deed of guarantee and indemnity dated 14 August 1996 executed by the second and third defendants.

[12] The plaintiff had on 20 August 1996 and 26 August 1996 disbursed a total sum of RM38m to the first defendant.

[13] Pursuant to para 20, the plaintiff also imposed on the first defendant a sum of RM28,000 by way of professional fees.

[14] The plaintiff had delivered to the first defendant monthly statements of account.

[15] The plaintiffs former solicitors had vide letter dated 28 February 1997 demanded payment by the first defendant of the outstanding sum of RM40,275,437.27 within seven days thereof, failing which the plaintiff would resort to litigation.

[16] Vide letter dated 7 March 1997 to the plaintiff, the first defendant confirmed that it would settle the interest of RM2,275,437.27. The plaintiff has from 1 September 1997 to 1 September 1999 by eight written notices to the first defendant varied the original rate of interest at 11% pa. **A**

[17] In view of the default and breach of the loan agreement by the first defendant, plaintiff has vide letter dated 30 December 1997 terminated the loan agreement and subsequently filed the claim herein. **B**

[18] First defendant's learned counsel Mr TY Teh submitted that the plaintiff is not entitled to the sum claimed as the plaintiff has after obtaining an order for sale foreclosed certain portion of the land and has also received compensation for certain portion of the land acquired by the Melaka State Authority. **C**

[19] Learned counsel, En Abu Bakar Jais (En Helmi Hamzah with him) contended that the first defendant is not entitled to raise unpleaded issues, relying on *Kamarudin bin Mamat v Ketua Polis Negara & Kerajaan Malaysia* [2004] 4 MLJ 201. **D**

[20] The above submissions make it necessary for me to carefully peruse the first defendant's amended defence consisting of 17 paragraphs. It is to be noted that the issues raised for the first defendant are truly unpleaded. **E**

[21] On the other hand, none of the issues pleaded in the first defendant's amended defence was the subject matter of the first defendant's submission.

[22] Harking back to first principles in civil procedure, it is trite law that parties are bound by their pleadings. An offshoot of this principle is that parties must adduce evidence and advance their submissions on the basis of their pleaded issues. There is no duty on my part to hear and determine unpleaded issues. **F**

[23] By way of illustration, in Kamarudin bin Mamat, at para 16, plaintiff's learned counsel had relied on unpleaded issues, which I held to be unsustainable. Paragraphs 19 to 23 of my judgment would provide the answer to the first defendant's submission. They are reproduced as follows: **G**

> [19] In a writ action such as the instant case, the rules governing pleadings are to be found in O 18 of the Rules of the High Court 1980.
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> [20] The object of pleadings, as set out by Buhagiar J in *Wong See Leng v C Saraswathy Ammal* [1954] MLJ 141 at p 142, (quoting Sullen and Leake's *Precedents of Pleadings* (10th Ed) p 1) are: **H**
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> (1) to define the issues of fact and questions of law to be decided between the parties;
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> (2) to give to each of them distinct notice of the case intended to be set up by the other and thus to prevent either party from being taken by surprise at the trial; **I**
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> (3) to provide a brief summary of the case of each party, which is readily available for reference and from which the nature of the claim and the defence may be easily apprehended, and constitute a permanent record of the questions raised in

A the action, and of issues decided therein, so as to prevent future litigation upon matters already adjudicated upon between the litigants.

[21] It is trite law that the parties herein are bound by their pleadings and the court is not entitled to decide a suit on a matter which is not pleaded and hence, the trial of the suit is confined to pleadings: see eg *Yew Wan Leong v Lai Kok Chye* [1990] 2 MLJ 152 at p 154.

B

[22] The rule of pleading is in line with the fundamental rule of natural justice, ie the right to be informed of any adverse point so that one has the opportunity of stating the answer: *Muniandy & Anor v Muhammad Abdul Kader & Ors* [1989] 2 MLJ 416 at p 418. Also see *Wisma Punca Emas Sdn Bhd v Dr Donal R O'Holohan* [1987] 1 MLJ 393; *Gimstern Corporation (M) Sdn Bhd & Anor v Global Insurance Co Sdn Bhd* [1987] 1 MLJ 302; and *Tan Ah Chim & Sons Sdn Bhd v Ooi Bee Tat & Anor* [1993] 3 MLJ 633.

C

[23] Obviously the procedural approach adopted by plaintiffs learned counsel to persuade the court to consider the unpleaded issues cannot be upheld. As a trial judge, I am not obliged to consider the unpleaded issues and where a judge has decided on unpleaded issues the judgment can be set aside and new trial ordered: *The Chartered Bank v Yong Chan* [1974] 1 MLJ 157.

D

[24] The unpleaded issues raised by first defendant's learned counsel herein therefore cannot be upheld.

E

CONCLUSION

[25] On the foregoing grounds, I give judgment for the plaintiff as claimed.

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Order accordingly.

Reported by Sally Kee

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